IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.906 OF 2016
WITH
CIVIL APPLICATION NO.1823 OF 2016

Shri Kumar Mahadev Ichalkaranje … Appellant
Versus
Shri Baburao Shivappa Havaldar … Respondent

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Mr. Murlidhar L. Patil for the Appellant.
Mr. Abhijeet J. Kandarkar for the Respondent.

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CORAM : S.C.GUPTE, J.

DATE : 6 FEBRUARY 2017

P.C. :

. Heard learned Counsel for the parties.

2 This second appeal challenges a judgment and order passed by the District Court at Sangli. By the impugned judgment and order, the learned District Judge dismissed the appeal filed by the Appellant herein and confirmed the judgment and decree passed by the Trial Court in Regular Civil Suit No.35 of 2003. The judgment and decree of the Trial Court allowed the suit filed by the Respondent (original Plaintiff) for redemption of a usufructuray mortgage.

3 The Plaintiff had filed this suit on the basis of a mortgage deed, under which, in consideration of a sum of Rs.15,000/- paid by the Defendant to him as mortgage money, he had handed over possession of

the suit property to the latter, to retain possession thereof for a period of five years and to use the same towards repayment of the mortgage money. It is the case of the Appellant (original Defendant) that the transaction between the parties is not a mortgage deed but a deed of lease. Both the Courts below, after taking into account the contents of the deed in question together with oral evidence of the parties, held the deed to be a self redeeming mortgage deed. The Courts below have come to the conclusion that the intention of the Plaintiff-mortgagor was to accept an amount of Rs.15,000/- as a loan, which was to be repaid over five years by allowing use of the suit property to the Appellant. The matter really pertains to construction of a written agreement between the parties. The written agreement, by all accounts, contains terms of a usufructuary mortgage created by the Plaintiff in favour of the Defendant. Learned Counsel for the Appellant submits that surrounding circumstances ought to have been taken into account by the Courts below. Learned Counsel relies on the judgments of the Supreme Court in **Keveripatnam Subbaraya Setty Annaiah Setty Charities Trust Vs. S.K. Vishwanatha Setty**[1] and **Puzhakkal Kuttappu Vs. C. Bhargavi**[2] in this behalf. Relying on the dicta in these judgments, he submits that for considering whether a transaction is a lease or a mortgage, the name given to the document is not conclusive; the question has to be decided on the basis of the predominant intention of the parties to be gathered from the recitals and terms of the document and the surrounding circumstances including the conduct of the parties. It is submitted the surrounding circumstances establish that the transaction was really in the nature of a lease and not a mortgage.

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1 (2004) 8 Supreme Court Cases 717
2 1977 AIR (SC) 105

4 In the first place, in case of a written contract, one has to go by the express terms of the contract read together and in the light of the recitals, if any, appearing in the document. Surrounding circumstances including the conduct of the parties are important where there is an an ambiguity in the document. The document in our case, on the face of it and going by the express terms read in the light of each other, clearly amounts to a usfructuary mortgage. The intention of the parties reflected in the document is to transfer interest in the suit property to secure repayment of a debt and not a mere transfer of a right to enjoy the property. Besides, the circumstances alleged by the Defendant do not conclusively establish that the document was a lease and not a mortgage.

4 Interpretation of a document is mostly a mixed question of law and fact. Both the Courts below have came to a concurrent finding that the document is a mortgagee deed and not a lease deed. Unless this interpretation is shown to be perverse, no substantial question of law can be said to arise from the interpretation. Besides, no term can be set up by the Plaintiff, which is at variance with the express terms of the document. Usufructuary mortgage is defined in clause (d) of Section 58 of the Transfer of Property Act, 1882, as a transaction where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property in lieu of interest, or in payment of the mortgage-money. In other words, the repayment of mortgage-money can be in terms of use of the property by the mortgagee. The terms of the written agreement drawn between the parties make it very clear and beyond doubt that it was a deed of usufructuary mortgage.

The mortgagee having recovered the mortgage-money in terms of the use of the mortgaged property made by him in accordance with the terms of the deed, the mortgagor-Plaintiff had the right to redeem the mortgage and recover possession of the mortgaged property.

5 There is no substantial question of law arising, in the premises, from the impugned judgment and order. The second appeal is, accordingly, dismissed. No order as to costs.

6 On the application of the Appellant, the interim relief operating in his favour is continued for a period of eight weeks from today.

7 In view of the dismissal of the second appeal, the civil application does not survive, and the same is also dismissed.

(S.C.GUPTE, J.)